Supreme Court, U.S.
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No. 91-1168

In The

Supreme Court of the United States

October Term, 1991

INTERNATIONAL EATERIES OF AMERICA, INC.,

Petitioner,

vs.

BROWARD COUNTY, FLORIDA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the court of appeals correctly applied *City of Renton v. Playtime Theaters, Inc.*, 435 U.S. 41 (1986), to uphold county zoning ordinances that set minimum separation requirements between adult-oriented business and residential areas, churches, schools and day care centers?

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Broward County, a political subdivision of the State of Florida, respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the decision of the Eleventh Circuit Court of Appeals in this case, reported at 941 F.2d 1157.

ADDITIONAL ORDINANCE PROVISIONS

BROWARD COUNTY ORDINANCES

The text of Broward County Ordinances 77-48 and 78-33, adopted on September 16, 1977, and June 27, 1978, respectively, are set out verbatim in the Respondent's Appendix. These ordinances

include the legislative findings of the Board of County Commissioners, which were omitted when the ordinances were codified as Sections 39-225 through 39-229, Broward County Code of Ordinances.

STATEMENT OF THE CASE

Petitioner's Statement of the Case improperly includes argument and facts that are not material to the questions presented, therefore Broward County here provides a complete Statement of the Case. Material printed in Petitioner's Appendix is referred to by appendix letter and page as follows: "Pet. App. A-1." Material printed in Broward County's Appendix is referred to as follows: "B.C. App. 1."

Petitioner operates an adult nightclub in unincorporated Broward County, Florida, which presents live nude dancing as the primary form of entertainment for its patrons. In 1986, Broward County issued notices of violation citing the Petitioner's business for operating within 500 feet of a residentially zoned district and within 1,000 feet of a church, in violation of Sections 39-225 through 39-229, Broward County Code of Ordinances. (Pet. App. B-5). Petitioner's nightclub, "Thee Dollhouse III," is located within 500 feet of a residentially zoned district and within 1,000 feet of the Kingdom Hall of Jehovah's Witnesses. (Pet. App. B-7).

The cited sections of the Broward County Code were adopted by the Board of County Commissioners of Broward County by Ordinance No. 77-48 on September 16, 1977, and by Ordinance No. 78-33 on June 27, 1978, and are referred to herein as the "distance ordinances." (B.C. App.)

Broward County also cited Petitioner for operating in a B-3 zoning district in violation of the "special use ordinances," which limited adult businesses to a three-fourths acre parcel zoned "B-2-B." These notices were collectively the subject of the previous case between these parties, *International Eateries of America, Inc. v. Broward County*, 726 F.Supp. 1556 (S.D. Fla. 1987), referred to hereafter as *"Dollhouse I."* (Pet. App. C). In that case, the district court held that the special use ordinances were invalid, both facially

and as applied, but held that the distance ordinances were facially valid. (Pet. App. B-11; C-16). The court reserved ruling only on Broward County's treatment of the Petitioner with respect to the distance ordinances. (Pet. App. C-15). The 1987 decision of the district court in *Dollhouse I* was not appealed.

After the final judgment was issued in *Dollhouse I* in 1987, Broward County again issued to Petitioner a notice of violation of the distance ordinances. The action which is the subject of the holding of the court of appeals below and this Petition arose from the 1987 notices of violation.

It is undisputed that Petitioner's adult nightclub is located within 500 feet of a residential area and within 1,000 feet of a Kingdom Hall of the Jehovah's Witnesses. The Petitioner opened its nightclub in violation of both the residential and church distance provisions. An officer of Petitioner corporation submitted an affidavit stating that adult entertainment would not be presented at the club. (Pet. App. C-7).

On December 15, 1987, Petitioner submitted a petition to the Broward County Building and Zoning Enforcement Division, pursuant to Section 39-225(b), Broward County Code of Ordinances, seeking a waiver of the residential distance requirement. (Pet. App. B-7). Section 39-225(b) provides:

> This prohibition shall be waived upon the presentment to the building and zoning enforcement division of a written petition requesting such a waiver, signed by 51 percent of all those persons owning real property, residing or operating or managing a business within 500 feet of the proposed location of the designated use.

The section goes on to set guidelines for circulation of the petition and to require verification of the petition by the enforcement division. (Pet. App. E).

In an attempt to satisfy the residential waiver section, a principal in Petitioner corporation purchased a duplex that was within the 500 foot radius of the nightclub and placed employees of "Thee

Dollhouse III" there as residents. The owners and residents of the duplex then signed the petition. (Pet. App. B-8).

The eight signatures on the petition represented more than 51 percent of those persons residing or owning residential property within 500 feet of Petitioner's nightclub. (Pet. App. B-8). However, the petition did not contain any signatures of persons owning commercial property or operating businesses within the 500 foot radius. Since there were many more than 15 persons within the group of potential signatories, the petition did not contain the required number of signatures. Broward County rejected the petition on or about December 22, 1987, for that reason. (Pet. App. B-9).

The waiver provision has been consistently interpreted by the Broward County Building and Zoning Enforcement Division to require signatures of 51 percent of a group of persons which includes owners of real property, residents, and owners or operators or managers of businesses within 500 feet of the proposed adult use. (Pet. App. B-9). Broward County has granted waivers to other petitioners pursuant to this interpretation of the provision. (Pet. App. B-10).

There was no evidence introduced at the 1989 trial regarding Broward County's treatment of Petitioner with respect to the 1,000 foot church distance provision. (Pet. App. B-11). The only testimony offered by Petitioner at the trial of this case that was admitted in evidence was concerning the circulation and submission of the waiver petition and the purchase and sale prices of the duplex residence within the 500 foot radius. (Pet. App. B-10, 11).

The district court held the Broward County distance ordinances to be valid as applied, which decision was upheld by the United States Court of Appeals for the Eleventh Circuit.

SUMMARY OF ARGUMENT

The court of appeals below properly upheld the validity of Broward County's adult use distance ordinances as applied to Petitioner's nightclub. After discussing the various opinions expressed in the Court's recent decision, *Barnes v. Glen Theatre, Inc.*, 501 U.S.

___, 111 S.Ct. 2456; 115 L.Ed.2d 504 (1991), the court of appeals correctly determined that the case at bar is controlled by *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986). The court of appeals then carefully applied the standards established in *Renton* and concluded that the Broward County distance ordinances are valid, content neutral, "time, place and manner" regulations.

Contrary to Petitioner's claim, the court of appeals did not relax the standard set in *Renton* regarding what evidence must be presented to show that a local government adopted an ordinance for the substantial purpose of preventing the negative secondary effects of adult businesses. The Broward County distance ordinances expressly state that they were adopted to combat the "deleterious effect" of adult businesses. Further, the evidence presented at trial established that Broward County had relied on the experiences of the City of Detroit in enacting its regulations, which is clearly permitted by the *Renton* test.

The decision of the court of appeals in this case did not conflict with other Eleventh Circuit decisions or the decisions of other circuits. The cases Petitioner cites as being in conflict with the instant case regarding the necessary type and amount of evidence of "negative secondary effects" predate *Renton* and should no longer be raised in support of Petitioner's argument. The cases also can be factually distinguished from the case at bar. Any language in those cases that imposes a greater burden on local governments than what the Court accepted in *Renton*, is no longer valid. There is no conflict, therefore, which requires this Court to accept jurisdiction of the instant case.

Petitioner, finally, suggests that the Court should apply a more stringent test than the "narrowly tailored" test in cases like the one at bar. The Court recently addressed and rejected this suggestion in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). The "narrowly tailored" standard requires a sufficiently close fit between the governmental interest furthered by such regulations and the effect on protected expression, while still permitting local governments the necessary flexibility to address local problems. Since there is no conflict between the court of appeals decision in this case and the holdings of this Court or the circuit courts, and since there is no need

to alter the well-established tests applied below, there is no reason for the Court to accept jurisdiction of this case.

ARGUMENT

The court of appeals' application of *City of Renton v. Playtime Theaters, Inc.*, to uphold the Broward County distance ordinances was correct and consistent with the holdings of this Court.

This case is controlled by this Court's previous holdings in *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986), and *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), and is not inconsistent with the Court's recent holding in *Barnes v. Glen Theatre, Inc.*, 501 U.S. ___, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991). Those cases provide clear guidelines to the lower federal courts and local governments regarding the proper method of regulation of adult-oriented businesses through the zoning power. The controlling law is well-settled and was correctly applied by the court of appeals. The conflict alleged by Petitioner does not exist because the cited decisions of the Fifth and Eleventh Circuits were decided before this Court ruled clearly in *City of Renton v. Playtime Theaters, Inc.* There is, therefore, no reason for the Court to exercise its discretion and accept jurisdiction in this case.

I. Considering the facts of *Barnes v. Glen Theatre, Inc.*, and the differing bases for the Court's holding in that case, *City of Renton v. Playtime Theaters* still controls the question of whether Broward County's zoning ordinances regulating adult-oriented businesses were valid as applied to Petitioner.

Petitioner extensively discusses the Court's opinions in *Barnes v. Glen Theatre, Inc.*, but does not really suggest that the court of appeals should have applied *Barnes* rather than *City of Renton v. Playtime Theaters, Inc.*, to this case. Nor does Petitioner suggest that the instant case would have a different outcome under any of the

analyses used in *Barnes*. *Barnes* will be discussed herein because it is the most recent treatment by the Court of a nude dancing regulation. The *Renton* case, however, more directly addresses the case at bar, and any difference between the analysis ultimately used by the court of appeals in this case and the Court in *Barnes* is insignificant.

Barnes v. Glen Theatre, Inc., 501 U.S. ____, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991), concerned the enforcement of a public indecency statute to prohibit nude dancing in adult nightclubs. The Indiana public indecency statute prohibited nudity in places of public accommodation. *Id.* at ____, 115 L.Ed.2d at 513. Chief Justice Rehnquist announced the judgment of the Court and wrote an opinion in which Justice O'Connor and Justice Kennedy joined. The justices joining in this plurality opinion found the statute was valid as applied because it was supported by a substantial governmental interest in the protection of the public morals, and the statute satisfied the other tests described in *United States v. O'Brien*, 391 U.S. 367 (1968).

Justice Scalia concurred separately to explain that statutes regulating conduct, which incidentally affect expression, should not be analyzed under first amendment precedents at all unless they were adopted for the purpose of prohibiting expression. *Barnes* at ____, 115 L.Ed.2d at 518. Justice Souter also wrote separately, concurring in the judgment, because the Indiana statute was supportable as a regulation intended to prevent the negative secondary effects of adult-oriented businesses. *Id.* at ___, 115 L.Ed.2d at 521.

The court of appeals reviewed these opinions and determined that *Barnes* did not directly control the Broward County case. Since the Court was divided in *Barnes*, the court of appeals viewed the case as resting on its narrowest basis, which was Justice Souter's concurring opinion. *International Eateries of America, Inc. v. Broward County*, 941 F.2d 1157, 1160 (11th Cir. 1991). Justice Souter upheld the Indiana statute on the basis of the *Renton* decision, which is a more stringent test than the tests used in the plurality opinion or Justice Scalia's concurrence. The court of appeals tested the Broward County ordinances against the most exacting of the standards used by members of this Court to uphold the statute in *Barnes* and found them valid.

It would seem that the Broward County regulations at issue here may be upheld under any of the three rationales used to sustain the statute in *Barnes*. The Indiana statute was a general prohibition that was scrutinized as applied to nude dancing establishments. All five justices that upheld the statute determined that it either did not implicate protected expression at all, or was adopted for a purpose unrelated to the suppression of speech, and was, therefore, "content neutral." The Broward County distance ordinances, likewise, are explicitly directed at the negative secondary effects that accompany certain adult-oriented uses and are, therefore, "content neutral."

This Court clearly established in *Renton* a three-part test for measuring the validity of local zoning ordinances that impact protected expression:

> The appropriate inquiry in this case, then, is whether the Renton ordinance is designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication.

City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, 50 (1986). The third part of the test was explained later in the opinion where the Court said, "[m]oreover, the Renton ordinance is 'narrowly tailored' to affect only that category of theaters shown to produce the unwanted secondary effects . . ." *Id.* at 52.

The court of appeals recognized that both the *Renton* "time, place and manner" test that is used to measure the validity of content-neutral regulations, and the four-part test established in *United States v. O'Brien*, 391 U.S. 367 (1968), have been applied to cases involving regulations that incidentally affect protected expression. As the court of appeals noted, this Court has found that the two tests are essentially the same and lead to the same results when applied. *International Eateries of America, Inc. v. Broward County*, 941 F.2d 1157, 1162 (11th Cir. 1991).[1]

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[1] The four-part test in *O'Brien* provides that an ordinance regulating symbolic conduct is valid:

> if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest

The court of appeals below determined that the ordinance at issue in this case was more like the regulation challenged in *Renton* than the public indecency statute at issue in *Barnes v. Glen Theater, Inc.*, 501 U.S. ___, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991), and, therefore, applied the "time, place and manner" test. The Broward County distance ordinances are zoning regulations, like those at issue in *Renton*. The distance ordinances at issue here also set similar minimum distances between the same types of businesses as the ordinance in *Renton*, although the cases have been litigated concerning different types of "expressive" activity. *Renton*, 475 U.S. at 44; *International Eateries of America, Inc. v. Broward County*, 726 F.Supp. 1568, 1571 (S.D. Fla. 1989). This decision by the court of appeals was clearly appropriate for the reason stated, and also because zoning regulations are, conceptually, regulations that permit and direct particular uses of land in the most appropriate place and manner for the local community.

II. The court of appeals correctly applied the test established in *Renton* to hold the Broward County adult use distance ordinances to be content neutral and narrowly tailored as applied to Petitioner.

The court of appeals reviewed the trial record and correctly applied the elements established in *Renton* to uphold the Broward County distance ordinances as applied. The court first considered whether the distance ordinances furthered a substantial governmental interest. The legislative basis of the distance ordinances is set forth

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is unrelated to the suppression of free expression; and if the incidental restriction on alleged First amendment freedoms is no greater than is essential to the furtherance of that interest.

United Statest v. O'Brien, 391 U.S. 367, 377 (1968). This test is substantially similar to the test in *City of Renton v. Playtime Theaters, Inc.* All legislation must be within the constitutional power of the government. Both tests require that the regulation further a substantial governmental interest; as Justice Souter noted in *Barnes v. Glen Theatre, Inc.*, the "content neutral" requirement of Renton equates to the requirement in *O'Brien* that the governmental interest be unrelated to the suppression of expression; the "narrowly tailored" element from *Renton* is the same as the requirement that the restriction of First Amendment freedoms be no greater than necessary to further the governmental interest. *See Barnes* at ____, *115 L.Ed.2d at 524*.

in the "whereas" clauses in Respondent's Appendix. (B.C. App. A-1, A-2, A-9, A-10). The distance ordinances state that they were adopted to combat the deleterious effects of certain adult-oriented businesses on residential areas and neighborhood businesses. The testimony received in *Dollhouse I* supported this legislative finding. *International Eateries of America, Inc. v. Broward County*, 726 F.Supp. 1556, 1564 (S.D. Fla. 1987). The testimony and planning study admitted in *Dollhouse I* established that the ordinances were narrowly tailored and left ample alternative sites for adult nightclubs.

A. The Broward County distance ordinances further a substantial governmental interest as applied to Petitioner.

The discussions of this Court in *Renton* and *Young* clearly establish that a local government's interest in protecting neighborhoods from downgrading and blight is a substantial governmental interest. *Young*, 427 U.S. at 71; *Renton*, 475 U.S. at 50. The Broward County distance ordinances were adopted expressly for those purposes. The Petitioner does not dispute that the court of appeals was correct to apply the test established by the Court in *City of Renton v. Playtime Theaters, Inc.*, to determine the validity of the Broward County distance ordinances as applied, but claims that the court of appeals somehow applied the test less stringently than required by the terms of *Renton*. (Petition at 17, 18.) In support of this claim, Petitioner states that the Broward County distance ordinances were simply "modeled after" the ordinance at issue in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), and that *Renton* and other court of appeals decisions require more. Petitioner is wrong regarding both the characterization of the Broward County ordinances and the requirements of *Renton*.

The record below established that, just like the City Council of Renton, the Broward County Board of County Commissioners received information from its professional planning staff, relied upon the experiences of the City of Detroit, determined that certain businesses were causing detrimental secondary effects to the surrounding neighborhoods, and enacted remedial legislation. The Petitioner alleges that there was insufficient evidence presented at trial of the existence of negative secondary effects from adult businesses in Broward County for the district court to uphold this determination by

the Board of County Commissioners. (Petition at 20.)[2] However, Broward County appropriately relied on the experiences of Detroit, which was expressly permitted by this Court in *Renton*.

The Court in *Renton* recognized that local governments may rely on the experiences of other cities in enacting such ordinances.[3] In fact, the "whereas" clauses of the Broward County distance ordinances are very similar to the legislative findings the Court held to be sufficient in *Renton*. The finding of the district court in *Dollhouse I* that Broward County had relied on the experiences of the City of Detroit, rather than merely "mimicked" it, is supported by competent substantial evidence in the form of the ordinances themselves and testimony given in *Dollhouse I*.

Petitioner claims that the court of appeals, in finding that the Broward County distance ordinances had a sufficient basis, ruled inconsistently with the decision of the Fifth Circuit in *Basiardanes v. City of Galveston*, 682 F.2d 1203 (5th Cir. 1982), and its own decision in *Krueger v. City of Pensacola*, 759 F.2d 851 (11th Cir. 1985). The standards applied in those cases regarding the sufficiency of evidence presented to a local government of negative secondary effects have been significantly modified by *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986), and the cases can be factually distinguished.

The Galveston ordinance at issue in *Basiardanes* had the effect of virtually banning all adult entertainment from the city and its distance provisions were struck down on that basis. 682 F.2d at 1213.

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[2] To the extent that this assertion is an attack on the facial validity of the ordinances, it was not before the court of appeals and is barred by res judicata. *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981); *International Eateries of America, Inc. v. Broward County*, 726 F.Supp. 1568, 1574 (S.D. Fla. 1989). However, the court of appeals did consider the legislative basis of the ordinances in deciding their validity as applied to Petitioner.

[3] We hold that Renton was entitled to rely on the experiences of Seattle and other cities . . . in enacting its adult theater zoning ordinance. The first Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.

City of Renton v. Playtime Theaters, Inc., 435 U.S. 41, 51 (1986).

The record in the instant case establishes that the Broward County distance ordinances leave ample opportunity for adult businesses to locate. (Pet. App. B-23). To the extent that the court in *Basiardanes* spoke disapprovingly of Galveston's reliance on the Detroit ordinances, that discussion must be evaluated in light of this Court's holdings in *City of Renton v. Playtime Theaters, Inc.* The *Basiardanes* case was decided before *Renton*, in which this Court specifically authorized local governments to rely on the experiences of other cities and counties.

Krueger v. City of Pensacola, 759 F.2d 851 (11th Cir. 1985), which also pre-dated *Renton*, concerned an attempt to ban topless dancing under the state's twenty-first amendment authority, as delegated to the city. The court of appeals found the ordinance invalid because the evidence below clearly showed that the legitimate governmental interest asserted by the city was not, in fact, the reason the city adopted the ordinance. There is no such evidence of an illegitimate, hidden motive behind Broward County's action.

Again, to the extent that the Eleventh Circuit discussed what evidence a government may rely upon in adopting such ordinances, *Krueger* must now be read in light of *Renton*. As the court of appeals below found in this case, Broward County's reliance on the experiences of Detroit satisfied the standard recognized by the Court in *Renton*. Both *Krueger* and *Basiardanes* follow a line of court of appeals decisions rendered between *Young v. American Mini-Theatres* and *Renton* in which courts struck down adult-use zoning ordinances because the local government had not established by original planning studies a local factual basis to show that the ordinance would further a substantial purpose. These cases should no longer be cited for this invalid proposition. As one commentator recognized:

> [T]he above court decisions are now of dubious validity as precedent in regard to a city's burden of showing that location restrictions on adult uses further a substantial public purpose in view of the Supreme Court's decision in *City of Renton* . . .

2 Zeigler, *Rathkopf's The Law of Zoning and Planning* §17B.02, 17B-31 n.118 (1991).

There is no conflict between the court of appeals' holding in this case and the decisions of other circuits. This Court so clarified the applicable standards for adult-use distance ordinances in *City of Renton*, that the federal legal issues are well-settled.

B. The Broward County distance ordinances are narrowly-tailored as applied to Petitioner.

As discussed briefly above, the record also clearly shows that the distance ordinances at issue are narrowly tailored and leave ample opportunity for Petitioner to operate in Broward County.[4] Petitioner ineffectively attacks the court of appeals' narrowly-tailored finding on two bases: this Court should instead use the "least intrusive means" test, and the distance ordinances do not further a legitimate governmental interest. (Petition at 25). The sufficiency of the governmental interest in the ordinances at issue was fully discussed above. Regarding the appropriate test, Petitioner may certainly suggest that this Court abandon the "narrowly tailored" standard in these cases in favor of a more strict test, but such a change would be unwise. The "narrowly tailored" standard sufficiently protects private interests and provides local governments with the flexibility necessary to address diverse local conditions.

The Court very recently reaffirmed the applicability of the "narrowly tailored" standard and rejected the "least intrusive means" test in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). The "narrowly tailored" standard recognizes that local governments must be given flexibility to address unique local problems. Petitioner asserts that the enforcement of certain Florida statutes would be a sufficient and less intrusive means of preventing the secondary effects of adult nightclubs. (Petition at 26). The statutes cited were general criminal, public health, and nuisance statutes. Statutes applicable statewide are not intended to provide specific remedies to address

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[4] The claim in footnote 19 of the Petition that the Broward County distance ordinances are not narrowly tailored because they include the residential waiver provision is clearly without basis. The inclusion of a waiver provision was certainly not constitutionally required, however, it demonstrates that Broward County has made every attempt to carefully craft the regulations to reach only the intended evil. As the court of appeals recognized, the Broward County waiver provision precludes arbitrary enforcement by its very terms.

unique local problems. Charter counties in Florida, such as Broward County, are vested with broad home rule powers to regulate for the protection of the public health, safety and welfare.[5] As Petitioner mentions in footnote 20 of the Petition, local governments have responded to local needs with a great variety of regulation. The "narrowly tailored" test requires a close enough fit between the governmental and private interests.

An examination of the court of appeals' decision below reveals that the court first determined that *Renton* controlled its analysis, and then carefully and correctly applied the test established in that case to uphold the Broward County distance ordinances as applied. Considering the clear statements of this Court in *City of Renton v. Playtime Theaters, Inc.*, and *Young v. American Mini Theatres, Inc.*, regarding the regulation of adult-oriented businesses, there is no conflict created by the decision below and there are no important questions of federal law raised by the Petition. There is, therefore, no reason for this Court to accept jurisdiction of this case.

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[5] Counties operating under county charters shall have all powers of local self-government not inconsistent with general law, or with special law approved by vote of the electors. The governing body of a county operating under a charter may enact county ordinances not inconsistent with general law. The charter shall provide which shall prevail in the event of conflict between county and municipal ordinances.

Fla. Const. art. VIII, § 1(g).

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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DATED: February 17, 1992

APPENDIX

ORDINANCE NO. 77-48

AN ORDINANCE AMENDING CHAPTER 39 OF THE BROWARD COUNTY CODE OF ORDINANCES; PROVIDING FOR THE ESTABLISHMENT OF CERTAIN USES AND ACCESSORY USES WHICH, WHEN CLUSTERED TOGETHER OR LOCATED IN CLOSE PROXIMITY TO EACH OTHER, TEND TO DEVALUATE BUSINESS AND RESIDENTIAL PROPERTY VALUES; PROVIDING FOR THE REGULATION AND RESTRICTION OF THE LOCATIONS OF SUCH USES; PROVIDING DISTANCE LIMITATIONS BETWEEN SUCH USES AND CHURCHES AND SCHOOLS; PROVIDING FOR THE ADMINISTRATION AND ENFORCEMENT OF THIS ORDINANCE; PROVIDING FOR PENALTIES; PROVIDING FOR REPEAL OF CONFLICTING ORDINANCES; PROVIDING FOR SEVERABILITY; PROVIDING FOR INCLUSION IN THE CODE;AND PROVIDING FOR AN EFFECTIVE DATE.

WHEREAS, it has been demonstrated that the establishment of certain businesses in business districts has a deleterious effect on both business and residential segments of the neighborhood causing blight and a downgrading of the property values; and

WHEREAS, the prohibition against the establishment of two (2) designated uses within one thousand (1,000) feet of each other serves to avoid the clustering of certain businesses which, when located in close proximity to each other, tend to create a downgrading in both business and residential property values; and

WHEREAS, the concentration of certain uses and accessory uses in business districts tends to interfere with the operation of other businesses and tends to discourage patrons from trading with other business enterprises not included in the list of uses and accessory uses set forth in this Ordinance; and

WHEREAS, it is deemed that this Ordinance is necessary for the preservation of the public peace, morals, health, safety and welfare of the inhabitants of Broward County, Florida; NOW, THEREFORE,

BE IT ORDAINED BY THE BOARD OF COUNTY COMMISSIONERS OF BROWARD COUNTY, FLORIDA:

Section 1. DEFINITIONS

1.01 Designated use.

For the purpose of this Ordinance, the term "designated use" shall mean and include such designated uses or accessory uses as shall be included in this Ordinance and which may from time to time be added to this Ordinance by amendment as the Board of County Commissioners of Broward County, Florida, in its continuing study of the various uses and accessory uses permitted in Chapter 39 of the Code of Ordinances of Broward County, Florida, may determine.

1.02 Adult Book Store.

For the purpose of this Ordinance, the term "adult book store" means and includes an establishment having as a substantial or significant portion of the stock in trade, books, magazines, and other periodicals which are distinguished or characterized by their emphasis on matter depicting, describing or related to "Specified Sexual Activities" or "Specified Anatomical Areas" (as defined below), or an establishment with a segment or section devoted to the sale or display of such material.

1.04 [sic] Adult Motion Picture Theater.

For the purpose of this Ordinance, the term "adult motion picture theater" means and includes an enclosed building with a capacity of fifty (50) or more persons used for presenting material distinguished or characterized by an emphasis on matter depicting, describing or relating to "specified Sexual Activities" or "Specified Anatomical Areas" (as defined below), for observation by patrons therein.

1.05 Adult Mini Motion Picture Theater.

For the purpose of this Ordinance, the term "adult mini motion picture theater" means and includes an enclosed building with a capacity for less than fifty (50) persons used for presenting material distinguished or characterized by an emphasis on matter depicting, describing or relating to "Specified Sexual Activities" or "Specified Anatomical Areas" (as defined below), for observation by patrons therein.

1.06 Specified Sexual Activities.

For the purpose of this Ordinance, the term "specified sexual activities" shall mean and include:

(a) Human genitals in a state of sexual stimulation or arousal;

(b) Acts of human masturbation, sexual intercourse or sodomy; and

(c) Fondling or other erotic touching of human genitals, pubic region, buttock or female breast.

1.07 Specified anatomical Areas.

For the purpose of this Ordinance, the term "specified anatomical areas" shall mean and include:

(a) Less than completely and opaquely covered:

(1) Human genitals, pubic region;

(2) Buttock; and

(3) Female breast below a point immediately above the top of the areola; and

(b) Human male genitals in a discernible turgid state, even if completely and opaquely covered.

1.08 Group "D" Cabaret.

For the purpose of this Ordinance, the term "group 'D' cabaret" shall mean and include cabaret which features naked, topless or bottomless dancers, entertainers or waitresses, go-go dancers, exotic dancers, strippers, male or female impersonators, or similar employees.

1.09 Massage Establishment.

The term "massage establishment", as used in this Ordinance, shall mean and include any shop, parlor, establishment or place of business wherein all or any one or more of the following named subjects and methods of treatments, are administered or practiced:

(a) Oil rubs, salt glows, hot or cold packs, all kinds of baths including steam rooms, cabinet baths, sitz baths, colon irrigations, body massage either by hand or by any mechanical or electrical apparatus or device (excluding fever therapy), applying such movements as stroking, friction, rolling, vibration, kneading, cupping, petrissage, rubbing, effleurage or tapotement.

(b) Nothing in this Ordinance shall be construed as applying to State of Florida-licensed barbers, cosmetologists, manicurists, pedicurists, physical therapists, physical therapists assistants, midwives, practical nurses, agents, servants or employees in licensed hospitals or nursing home or other licensed medical institutions, licensed physicians, osteopaths, chiropractors, podiatrists, naturopathic physicians or other licensed medical practitioners, or their agents, servants or employees acting in the course of such agency, service or employment.

1.10 Health spa.

For the purpose of this Ordinance, the term "health spa" shall mean and include all health studios, exercise salons, relaxation spas, health salons, health clubs and adult relaxation spas.

1.11 Encounter studio.

For the purpose of this Ordinance, the term "encounter studio" shall mean and include all establishments offering nude encounter sessions, encounter sessions between males and females, nude dance encounter sessions, and sexual consultations.

Section 2. DISTANCE LIMITATIONS BETWEEN DESIGNATED USES

2.01 In the development, enforcement and amendment of this Ordinance, it is recognized that there are uses and accessory uses which because of their very nature are recognized as having serious objectionable characteristics particularly when several of them are concentrated in any given location, thereby having a deleterious effect upon the adjacent business and residential areas. Special regulation of these uses is necessary to ensure that these adverse effects will not contribute to the blighting and downgrading of the surrounding neighborhood. None of the designated uses set forth in this Ordinance, or added from time to time to this Ordinance by amendment, shall be located nearer to the same or any other designated use nor nearer to any church or public, private or parochial elementary, middle or high school than one thousand (1,000) feet measured along the shortest possible line lying entirely within public streets, such measurement being between the nearest entrance to the designated use and the nearest entrance to another designated use, or the nearest entrance of the designated use and the nearest point on the plot occupied by the church or school.

Section 3. DESIGNATED USES

3.01 The following uses are declared to be "designated uses":

(a) Adult Book Store.
(b) Adult Motion Picture Theater.
(c) Adult Mini Motion Picture Theater.
(d) Group "D" Cabaret.
(e) Massage Establishment.
(f) Health Spa.
(g) Encounter Studio.

Section 4. APPLICATION TO NEW CHURCHES AND SCHOOLS

4.01 Where a designated use is located in conformity with the provisions of this Ordinance, the subsequent locating of a church or school within one thousand (1,000) feet of such existing designated use shall not be construed to cause such designated use to be in violation of this Ordinance.

Section 5. ORDINANCE NOT RETROACTIVE

5.01 The provisions of this Ordinance shall not be construed to be retroactive, and any existing designated use which conformed to the regulations in effect when such designated use was established shall not be rendered illegal or in violation through the adoption of this Ordinance or amendments to this Ordinance, so long as the occupational license issued for such use remains in full force and effect and is renewed in a timely manner.

Section 6. PENALTY

6.01 Any person convicted of a violation of this Ordinance shall be punished as provided by law.

Section 7. REPEAL OF CONFLICTING ORDINANCES

7.01 All ordinances or parts of ordinances in conflict herewith are hereby repealed only to the extent necessary to give this Ordinance full force and effect.

Section 8. SEVERABILITY

8.01 If any section, sentence, clause or phrase of this Ordinance is held to be invalid or unconstitutional by any Court of competent jurisdiction, then said holding shall in no way affect the validity of the remaining portions of this Ordinance.

Section 9. INCLUSION IN CODE

9.01 It is the intention of the Board of County Commissioners that the provisions of this Ordinance shall become and be made a part of the Broward County Code; and that the sections of this Ordinance may be renumbered or relettered and the word "ordinance' may be changed to "section," "article," or such other appropriate word or phrase in order to accomplish such intentions.

Section 10. EMERGENCY ENACTMENT

10.01 This Ordinance shall be immediately certified by the Clerk of the Board to the Department of State and shall take effect upon receipt of official acknowledgment from that office that it has been filed, or, if adopted as an emergency enactment, upon its mailing by Special Delivery and Registered Mail to the Department of State.

ENACTED this 16th day of September, A.D., 1977.
FILED WITH DEPARTMENT OF STATE
September 22, 1977
EFFECTIVE September 26, 1978

AP:ed
9/20/77
1086-358

ORDINANCE NO. 78-33

AN ORDINANCE RELATING TO THE PROHIBITION OF CERTAIN DESIGNATED USES WITHIN FIVE HUNDRED (500) FEET OF THE RESIDENTIALLY ZONED DISTRICTS LISTED HEREIN EXCEPT WHEN FIFTY-ONE PERCENT (51%) OF THOSE PERSONS OWNING REAL PROPERTY, RESIDING OR DOING BUSINESS WITHIN FIVE HUNDRED (500) FEET OF THE PROPOSED LOCATION WAIVE SAID PROHIBITION AS HEREIN PROVIDED; AMENDING CHAPTER 39 OF THE BROWARD COUNTY CODE OF ORDINANCES AND ORDINANCE NO. 77-48 ACCORDINGLY; AMENDING ORDINANCE NO. 77-48 TO CHANGE THE METHOD OF MEASURING DISTANCES RELATING TO ALL DESIGNATED USES; PROVIDING FOR PENALTIES; PROVIDING FOR SEVERABILITY PROVIDING FOR INCLUSION IN THE CODE; AND PROVIDING FOR AN EFFECTIVE DATE.

(Sponsored by Commissioner Kolb)

WHEREAS, it has been demonstrated that the establishment of certain businesses in business districts has a deleterious effect on both the business and residential segments of the neighborhood, causing blight and a downgrading of the property values; and

WHEREAS, the prohibition in Ordinance No. 77-48 against the establishment of two (2) designated uses within one thousand (1,000) feet of each other serves to avoid the clustering of certain businesses which, when located in close proximity to each other, tend to create a downgrading in both business and residential property values; and

WHEREAS, such prohibition fails to avoid the deleterious effects of blight and devaluation of both business and residential property values resulting from the establishment of a designated use (an adult book store, adult motion picture theater, group "D" cabaret, massage establishment, health spa or encounter studio, as those terms are defined in Ordinance No. 77-48) in a business district which is

immediately adjacent to and which serves residential neighborhoods; and

WHEREAS, concern for a pride in the orderly planning and development of a neighborhood should be encouraged and fostered in those persons who comprise the business and residential segments of that neighborhood; and

WHEREAS, the Board of County Commissioners and the Building and Zoning Enforcement Division of the Community Services Department of Broward County, Florida, should be guided by the expressed will of those businesses and residents which are immediately adjacent to the proposed location of, and therefore most affected by the existence of, any designated use; and

WHEREAS, it is deemed that this Ordinance is necessary for the preservation of the public peace, morals, health, safety and welfare of the inhabitants of Broward County, Florida; NOW, THEREFORE,

BE IT ORDAINED BY THE BOARD OF COUNTY COMMISSIONERS OF BROWARD COUNTY, FLORIDA:

Section 1. That Section 1 of Ordinance No. 77-48 is hereby amended by amending subsection 1.08 and subdivision (b) of subsection 1.09 and by adding subsections 1.12, 1.13, 1.14 and 1.15, to read:

1.08 Group "D" Cabaret.

For the purpose of this Ordinance, the term "group 'D' cabaret" shall mean and include <u>any place of business or establishment or</u> cabaret which features <u>the following</u> naked, topless or bottomless <u>employees</u>: dancers, entertainers or waitresses, go-go dancers, exotic dancers, strippers, male or female impersonators, or similar employees.

<u>1.09 Massage Establishment</u>

...

(a)

...

(b) Nothing in this Ordinance shall be construed as applying to State of Florida-licensed barbers, cosmetologists, manicurists, pedicurists, physical therapists assistants, midwives, practical nurses, agents, servants or employees in licensed hospitals or nursing home or other licensed medical institutions, licensed physicians, osteopaths, chiropractors, podiatrists, naturopathic physicians or other licensed medical practitioners, or their agents, servants or employees acting in the course of such agency, service or employment under the supervision of the licensee."

1.12 Person

For the purpose of this Ordinance, the word "person" means and includes any adult individual, firm, association, joint venture, partnership, estate, trust, business trust, syndicate, fiduciary, corporation, or any combination thereof, or other entity.

1.13 Residentially zoned district.

For the purpose of this Ordinance, the term "residentially zoned district" means and includes districts R-1A, R-1B, R-1C, R-1P, R-1T, R-2, R-2P, R-2U, R-3, R-3U, R-4, R-4A, R-4B, R-5, R-6, T-1, T-1A, T-1B, T-1C, PUD, A-1, D-1, E-1 and E-2 in unincorporated Broward County and districts zoned residential in accordance with the ordinances or regulations of any municipality within Broward County.

1.14 Cabaret.

For the purpose of this Ordinance, the term "cabaret" shall mean and include any place wherein any type of alcoholic beverage is sold or given away for consumption on the premises and the operator thereof holds a license from the state of Florida to sell alcoholic beverages for consumption on the premises and wherein the

patrons are provided with entertainment or space for dancing.

1.15 Alcoholic Beverage.

For the purpose of this Ordinance, the term "alcoholic beverage" shall mean and include any beverage containing more than one (1) percent of alcohol by weight.

Section 2. That subsection 1.09 of Ordinance No. 77-48 is hereby amended by adding a subdivision (c) to read:

(c) Provided, however, that for the purpose of this Ordinance, the term "massage establishment" shall not include any massage establishment wherein at least one (1) State of Florida-licensed masseur or masseuse is employed and on duty fulltime during the hours open for business.

Section 3. That Section 2 of Ordinance No. 77-48 is hereby amended by amending subsection 2.01 and by adding subsections 2.02 and 2.03, to read:

2.01 In the development, enforcement and amendment of this Ordinance, it is recognized that there are uses and accessory uses which because of their very nature are recognized as having serious objectionable characteristics particularly when several of them are concentrated in any given location, thereby having a deleterious effect upon the adjacent business and residential areas. Special regulation of these uses is necessary to ensure that these adverse effects will not contribute to the blighting and downgrading of the surrounding neighborhood. None of the designated uses set forth in this Ordinance, or added from time to time to this Ordinance by amendment, shall be located nearer to the same or any other designated use nor nearer to any church or public, private or parochial, kindergarten, nursery, elementary, middle or high school,, or day care center that one thousand (1,000) feet. Measurement of the one thousand (1,000) feet shall be made in accordance with subsection 2.03 hereof. ~~measured along the shortest possible line lying entirely within public streets, such measurement being between the nearest entrance to the designated use, or the nearest entrance of the designated use and the nearest point on the plot occupied by the church or~~

~~school.~~

2.02 It shall be unlawful hereafter to establish any designated use within unincorporated Broward County if the proposed located is within five hundred (500) feet of a residentially zoned district. This prohibition shall be waived upon the presentment to the Building and Zoning Enforcement Division of a written petition requesting such waiver, signed by fifty-one percent (51%) of all those persons owning real property, residing or operating or managing a business within five hundred (500) feet of the proposed location of the designated use. The circulator of the petition requesting a waiver shall subscribe and swear to an affidavit attached to the petition that the circulator personally witnessed the signatures on the petition and that the signatures were affixed to the petition by the persons whose names appear on the petition. Said petition shall bear at the top of each page thereof a type written title in substantially the following form: "The undersigned hereby request a waiver from the Building and Zoning Enforcement Division of Broward County, Florida, that shall permit the establishment and location of a(an) (state specifically which designated use is sought to be established) within five hundred (500) feet of my real property, residence or business." Building and Zoning Enforcement Division shall carefully investigate the petition and signatures on the petition to verify that the petitioners do in fact own real property, or reside or do business in a residentially zoned district within five hundred (500) feet of the proposed designated use. Measurement of the five hundred (500) feet shall be made in accordance with subsection 2.03 hereof.

2.03 For the purposes of this Ordinance, a designated use or proposed designated use shall be deemed to be within one thousand (1,000) or five hundred (500) feet of another designated use or church, school, real property, residence, business or residentially zoned district, respectively, as defined or described herein, if any part of the building in which, or plot of land upon which, a designated use is locate or proposed to be located is within one thousand (1,000) feet or five hundred (500) feet, as the case may be, as measured by an actual or imaginary straight line upon the ground or in the air, of any part of the building in which, or plot of land upon which, another designated use or such church, school, real property, residence, business or residentially zoned district, respectively, is located..

Section 4. That Section 4 of Ordinance No. 77-48 is hereby amended, to read:

Section 4. APPLICATION TO NEW CHURCHES, ~~AND~~ SCHOOLS OR RESIDENTIALLY ZONED DISTRICTS

4.01 Where a designated use is located in conformity with the provisions of this Ordinance, the subsequent locating of a church or school within one thousand (1,000) feet, or a residentially zoned district within five hundred (500) feet, of such existing designated use shall not be construed to cause such designated use to be in violation of this Ordinance.

Section 5. PENALTY

5.01 Any person convicted of violating any portion of this Ordinance shall be punished as provided by law.

Section 6. SEVERABILITY

6.01 If any section, sentence, clause or phrase of this Ordinance is held to be invalid or unconstitutional by any Court of competent jurisdiction, then said holding shall in no way affect the validity of the remaining portions of this Ordinance.

Section 7. INCLUSION IN CODE

7.01 It is the intention of the Board of County Commissioners that the provisions of this Ordinance shall become and be made a part of the Broward County Code; and that the sections of this Ordinance may be renumbered or relettered and the word "ordinance' may be changed to "section," "article," or such other appropriate word or phrase in order to accomplish such intentions.

Section 8. EFFECTIVE DATE

8.01 This Ordinance shall become effective as provided by law.

ENACTED this 27th day of June, A.D., 1978.
FILED WITH DEPARTMENT OF STATE THIS 6th DAY OF JULY, A.D., 1978.
EFFECTIVE THIS 11th DAY OF JULY, A.D., 1978.

AP:al
6/28/78
78-249